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May 26, 1998

HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Petition for Reconsideration and Clarification
of Omnipoint Communications Inc.
CC Dkt. No. 96-115

Dear Ms. Salas:

Enclosed please find an original and eleven (11) copies of the Petition for Reconsideration and Clarification of Omnipoint Communications Inc. filed in the above-captioned matter.

If you have any questions, please feel free to contact me.

Sincerely,

James J. Halpert

JJH/spj
Enclosure

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Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	CC Dkt. No. 96-115
of Customer Proprietary Network	)	
Information and Other Information	)	
	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF OMNIPOINT COMMUNICATIONS, INC.

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Attorneys for Omnipoint Communications, Inc.

Date: May 26, 1998

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PETITION FOR RECONSIDERATION AND CLARIFICATION OF OMNIPOINT COMMUNICATIONS, INC.

Introduction and Summary

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys, hereby petitions the Commission for reconsideration and clarification of the Second Report and Order[1] ("Order") in the above-captioned proceeding. Omnipoint is a small business PCS licensee, and is investing substantial resources to deploy integrated GSM-based digital wireless service in the New York, Philadelphia, Miami and Boston regions, as well as in other markets. Omnipoint is a new entrant in the markets in which it provides service, competing against well-established wireless operators.

In this petition, Omnipoint asks the Commission to reconsider and to clarify several regulatory requirements in the Order that would adversely affect the ability of new entrants such as Omnipoint to compete with incumbent providers and to develop and deploy new offerings in the CMRS market. First, Omnipoint seeks reconsideration, or in the alternative further

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1 Second Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. Nos. 96-115, 97-149, FCC 98-27, 63 Fed. Reg. 20327 (April 24, 1998).

clarification, of the Order and the Common Carrier Bureau's Order of May 21, 1998 ("Clarifying Order")[2] with respect to the effect of the Order on integrated CMRS offerings. The Commission's original suggestion that it might exclude from the total service approach those integrated CMRS offerings that bundle CPE and information services with telecommunications was misplaced. This rule is not required by 47 U.S.C. § 222(c)(1), and imposes artificial landline telephony distinctions that are in sharp conflict with both the expectations of CMRS consumers, and the established business practices of CMRS carriers. If left unchanged, this rule would seriously impair the ability of carriers like Omnipoint who have invested substantial resources in GSM technology to market the innovative integrated services that this technology makes possible. The rule would also stifle innovation in the CMRS market generally and frustrate the ability of CMRS to become a competitor in the local exchange market.

Second, Omnipoint urges the Commission to scale back at least the software and electronic audit requirements of the § 65.2009 Safeguards as they apply to the highly competitive CMRS market. In this market, these rules would present a significant barrier to competition, disadvantage new entrants that compete against large incumbents, and increase the cost of service, without providing significant benefit to consumers. In addition, Omnipoint believes that an opt-out rule is consistent with Section 222 and more appropriate for competitive marketplaces such as CMRS than the opt-in rule adopted by the Order.

Third, Omnipoint asks the Commission to reconsider and clarify the Order's conclusion that absent customer opt-in, CPNI may not be used to retain or win back soon-to-be-former and former customers. This rule rests on an overly narrow construction of Section 222, and would deprive consumers of the significant benefits of direct carrier competition for their business.

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2 Order, CC Dkt. No. 96-115, DA 98-971 (rel. May 21, 1998).

Finally, Omnipoint seeks clarification of two other significant issues relating to the order, namely: (1) that customer rewards programs using CPNI that offer customers free equipment and other items are not prohibited by Section 64.2005(b); and (2) that CMRS information service and handset billing information are not CPNI merely because they appear on a monthly CMRS bill which includes telecommunications charges.

These changes and clarifications are fully consistent with Section 222 and would better reflect the balance between consumer privacy and competition that Congress intended in enacting Section 222.

I. THE APPLICATION OF THE TOTAL SERVICE APPROACH SHOULD BETTER REFLECT CONSUMER EXPECTATIONS REGARDING INTEGRATED CMRS OFFERINGS.

Omnipoint is pleased that the Common Carrier Bureau issued its Clarifying Order addressing the effect of the Order on integrated CMRS offerings. The Clarifying Order states that carriers who already bundle CPE and information services with telecommunications service may "use CPNI to market a new bundled offering that includes [either] new CPE or similar information services." Id. ¶ 7. As Omnipoint understands the Clarifying Order, it permits CMRS carriers who already bundle telecommunications service with information services and handsets to use CPNI to market a variation of any of these three elements of the integrated service offering, including new or additional elements within the carrier's existing categories of service. To the extent that the Commission's understanding of the Clarifying Order differs from this interpretation, Omnipoint seeks reconsideration of the February 26th Order.[3]

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[3] To the extent that the Commission's understanding is consistent with Omnipoint's, Omnipoint believes that this question would nonetheless benefit from a somewhat fuller explication, and offers the following analysis as support for further clarification regarding CMRS carriers' ability pursuant to Section 222 to use CPNI to market integrated service offerings.

Omnipoint strongly objects to the Commission's original decision to exclude from the total service approach those CMRS offerings that bundle handsets and information services with CMRS telephony. Order at ¶¶ 48, 77. That decision is not required by the statute, is contrary to the total service approach that the Order adopts in interpreting other aspects of Subsection 222(c)(1)(B), and artificially imposes distinctions from landline telephony on CMRS in an unjustifiable departure from a string of Commission decisions that encourage flexible and integrated CMRS service offerings.

A. Subsection 222(c)(1) Supports a Functional Approach to Integrated CMRS Offerings.

The Order excludes bundled information services and CPE offerings from the total service approach on the theory that Subsection 222(c)(1) requires this result. Order at ¶¶ 47, 77. Its analysis focuses principally on the general question of whether bundled CPE and information services may be marketed using CPNI. Id. ¶¶ 47-48, 71-76. The Order devotes a single paragraph to examining the applicability of § 222(c)(1)(B) to the CMRS context, reasoning that because its text contains no express "exception for CMRS-related CPE and information services," Congress intended to exclude those services from the subsection. Id. ¶ 77. This same paragraph then concludes by suggesting that the Commission may consider in the future whether "the public interest" authorizes applying the total service approach to marketing of CMRS CPE. Id. In Omnipoint's view, the Order's conclusion rests on an overly narrow interpretation of the statute.

In fact, both the plain language of § 222(c)(1)(B) and the public interest[4] strongly support the use of CPNI to refine integrated CMRS service offerings that include information services, as

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4 Public interest considerations are discussed in subsection I. c. below.

well as specialized handsets. Subsection 222(c)(1) authorizes use of CPNI by a telecommunications carrier without customer approval

> in its provision of (A) *the* telecommunications service from which such information is derived, or (B) services necessary to, *or used in*, the provision of such telecommunications, *including publishing directories.*

(emphases supplied).

First, it is simply not relevant for purposes of this analysis that the statute does not contain an exemption for CMRS. The mere fact that Section 222(a) extends the reach of the statute to all telecommunications carriers does not mean that the statute requires a "one-size-fits-all" application of the statute to all carriers in the same way. Indeed, the plain language of the statute requires a focus on "*the* telecommunications service from which [the CPNI] is derived," and the other services "used in the provision of such service." Id. Accordingly, when evaluating use of CPNI derived from CMRS service under subsection 222(c)(1)(B), the Commission must examine the services in their proper context, and should not assume that rules from the wireline context should apply absent a statutory exemption.

Second, Congress' choice of the statutory example of directories, which are only loosely related to provision of telecommunications service, demonstrates that § 222(c)(1)(B) should be construed broadly. Directory service is not used in most telephone calls, and is simply functionally related to the underlying telecommunications service. This interpretation is reinforced by Congress' decision to include the more general term "used in" in the disjunctive with the term "necessary to," indicating that the statute encompasses services that are not an essential part of the underlying telecommunications service. While the Order concluded that this disjunctive phrase referenced only "adjunct-to-basic" services, id. at ¶ 73, a term which has meaning to a large extent only in the wireline regulatory context, the functional approach of the statute requires that the Commission adopt a more flexible approach.

Omnipoint's CMRS service is an example of an innovative service that integrates communications services to compete in the wireless market. Every subscriber to Omnipoint's

GSM service automatically receives an Internet e-mail account linked to their phone number, free voice mail service which provides subscribers with text messages through their handset, and a choice of several categories of information services when they sign up for service. Customers routinely receive information services, including e-mail messages, delivered through their GSM handset to the handset screen. Furthermore, Omnipoint's information service offerings deliver information from the Internet to CMRS customers. Customers receive these information services in an integrated package with CMRS telecommunications, are billed for their use of information services on their CMRS telephone bill (when those services are not included in the monthly subscription fee), and expect that CPNI will be used to refine the integrated service offerings that Omnipoint makes available to them. Omnipoint continually looks to add new communications services, regardless of how they may meet regulatory categories, in order to benefit customers and build good will, and hopes that the Commission's CPNI policies will not stifle innovation.

These CMRS information services are far more integrally related to the provision of CMRS telecommunications service than are published directories, and therefore are clearly "used in" the provision of CMRS telecommunications within the meaning of § 222(c)(1)(B). Furthermore, unlike the key premise of the Order (at ¶ 72) that information services are not "provided to consumers independently of their telecommunications service," all of Omnipoint's services, including its CMRS information services, are provided to consumers in conjunction with telecommunications through a single handset.

In addition, CMRS handsets are part of the licensed CMRS service in a manner that is fundamentally different than landline CPE. First, they are regulated as part of a CMRS carrier's licensed Title III service,[5] and are mobile transmitters. rather than stationary "equipment

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5 See 47 C.F.R. § 24.232(b) (broadband PCS mobile stations/handsets used as part of licensed system must meet specific power limits); § 24.51 (only type-accepted PCS handset equipment may be used with licensed service).

employed on the premises of a person" within the meaning of the definition set forth in 47 U.S.C. § 153(14). As a number of parties explained in pleadings relating to Requests for Deferral of the Order,[6] customers cannot receive digital CMRS service unless they obtain a specially programmed handset with authentication and security codes.[7]

The handset is essential to receiving both telecommunications and information services from the CMRS carrier, and the carrier's ability to market new and innovative handsets determines to a significant degree the carrier's success in the CMRS marketplace. The role of the handset in CMRS telecommunications is every bit as important as inside wiring installation, maintenance and repair service, which the Order classifies as "both 'necessary to' and 'used in' a carrier's provision of wireline telecommunications service." Id. at ¶ 79. Accordingly, CMRS handsets are both "necessary to" and "used in the provision of [a CMRS carrier's] telecommunications service" within the meaning of Section 222(c)(1)(B).

B. The Decision to Exclude CMRS Information Services and Handsets From the Total Service Approach Is Inconsistent with the Order Itself.

The Order classifies integrated CMRS services according to regulatory categories of "basic," "adjunct to basic," "information services," and "CPE" that were developed in the context of landline telecommunications. Order at ¶¶ 71-75 & 77. As discussed in the preceding section, this approach is inconsistent with Section 222(c)(1)(B) because it does not focus on the particular service at issue, integrated CMRS service delivered through a single handset.[8]

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6 See, e.g., CTIA Request for Deferral and Clarification, at 16-18.

7 For example, the SIM card used in GSM technology contains the "personalization" information for each customer, and installing a SIM in a different, compatible phone allows roaming calls to reach the customer at the customer's original, assigned phone number.

8 The Order (at ¶ 47) does analyze whether bundled CMRS information services and CPE are "telecommunications," for purposes of § 222(c)(1)(A), but as noted above, does not conduct a similar analysis with respect to § 222(c)(1)(B).

The Order's approach is also internally inconsistent in three respects. First, the Order does not address whether flexible, integrated CMRS handset offerings serve the public interest, even though the Order deems this a relevant consideration. Id. at ¶ 77. However, in numerous other proceedings (discussed in the next section), the Commission has repeatedly determined that integrated CMRS offerings served the public interest.

Second, the Order disregards the significance of CMRS customer expectations of use of their CPNI in integrated CMRS service offerings, id. at ¶ 77, after finding the same factor to be of enormous importance in adopting the total service approach. The Order explains at length with regard to the total service approach that consumer expectations of carrier use of CPNI should govern the scope of customer approval requirements under § 222(c)(1). Id. ¶¶ 54-58, 64. In adopting the total service approach, the Order explains that customers "are willing for carriers to use their CPNI without their approval to provide them service (and under section 222(c)(1)(B), services necessary to, or used in, such service) within the parameters of the customer-carrier relationship." Id. at ¶ 54. It further notes that this flexible approach "facilitates . . . convergence" and encourages innovations, such as multi-purpose handsets, id. at ¶ 58, and that integrated service offerings are "desirable" and consistent with the 1996 Act. Id. at ¶ 64.

However, the Order adopts a markedly different, narrow approach in interpreting Section 222(c)(1)(B), in contravention of many of the factors that justified the total service approach itself -- including CMRS consumer expectations and serious public interest concerns regarding the effect of the Order on convergence, innovation and competition in CMRS.

Finally, in interpreting § 222(c)(1)(B), the Order rejects the relevance of prior Commission orders permitting "more information sharing" in marketing of CMRS information services and CPE. Id. at ¶ 77. This approach differs markedly from the Order's reliance on pre-1996 Act "Commission policy permitt[ing] carriers to use CPNI to market related service offerings" as a significant source of consumer privacy expectations justifying the total service approach. Id. at ¶ 57. It is likewise inconsistent with the Commission's decision to interpret

§ 222(c)(1)(B) with reference to "basic," "adjunct-to-basic," "information services," and "CPE" classifications set forth in prior orders. Id. at ¶¶ 48, 72-75.

C. The Decision to Exclude CMRS Information Services and Handsets From the Total Service Approach Imposes Landline Telephony Distinctions On the Very Different CMRS Environment and Is Contrary to the Public Interest.

The Order indicates that public interest considerations may be sufficient to bring certain bundled CMRS service offerings within the total service approach, and that the Commission may consider that issue in the future. Id. at ¶ 77. This is correct as a matter of law because the Commission has ample discretion under Section 222 to promulgate rules consistent with the intent of the statute that also further the public interest. Omnipoint urges the Commission to conduct such an examination of public interest considerations on reconsideration to avoid discouraging competition and innovation in the CMRS market.

The CPNI rules contradict the Commission's stated policies to promote the rapid deployment of competing wireless systems and to encourage the industry to adopt flexible, market-based wireless services. The Commission has given PCS carriers great flexibility in the offering of integrated services to consumers. As a result, the PCS industry has become a highly competitive industry in which providers deploy and seek to market a variety of innovative services -- including integrated information services and handsets -- to their existing customers. These activities, which clearly serve the public interest, would be seriously impeded by new Section 65.2005(b)(1).

For example, like many of its wireless competitors, Omnipoint intends to deploy a dual-band, dual-mode phone to facilitate roaming. However, such a service is of little interest to Omnipoint's customers who do not already utilize its roaming capabilities. In deciding whether to promote such a product to all its customers, Omnipoint must be able to test-market the service and target its initial marketing effort to customers who already make use of Omnipoint's roaming service. Obtaining opt-in approval before engaging in such an effort would compromise the

value of market tests by skewing the sample of respondents, and would greatly interfere with Omnipoint's ability to reach customers who are most likely to be interested in the program.

The Commission has recognized the public interest benefits of PCS services which offer consumers opportunities for integrated service offerings. The Commission's enlightened regulatory approach has engendered significant competition in wireless services, with operators offering options integrating each facet of the business: telecommunications, information services and type-approved wireless devices. Consumers have taken advantage of these diverse offerings, and subscribe to an array of flexible service offerings from their carriers. Likewise, no legitimate privacy interests are implicated because consumers buying an integrated package of wireless service and equipment from a given operator do not expect their CMRS operator to be prohibited from marketing further CMRS services and equipment within their existing total service relationship. Operators like Omnipoint, in turn, have made substantial investments toward deployment of state-of-the-art digital wireless systems. The Commission must not now waiver in its commitment to CMRS flexibility.

For many years, the Commission has encouraged the deployment of integrated PCS services and equipment by avoiding imposition of the strict wireline regulatory classifications. Indeed, the Commission's Second Report and Order, which set the initial framework for PCS licensing and service regulation, emphasized that "[t]he regulatory plan embodied in the new PCS rules will provide licensees . . . the *maximum degree of flexibility* to introduce a wide variety of new and innovative telecommunications services and equipment."[9] In fact,

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[9] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GN Dkt. No. 90-314, 8 FCC Rcd. 7700, 7702 (1993) (emphasis supplied) (subsequent history omitted). From the very inception of the service, one of the Commission's fundamental policy goals for PCS was service flexibility. See Policy Statement and Order, GN Dkt. No. 90-314, 6 FCC Rcd. 6601 (1991) (" . . . it seems certain that these new underlying [PCS] technologies will offer an array of advanced voice and data services") ("We will encourage significant flexibility in the development of technologies and services.").

competitive PCS packages that integrate a mix of services are today fulfilling the Commission's CMRS regulatory objectives: "[t]he rise of competitive forces . . . has been made possible . . . by the Commission's deliberate dismantling of an old regulatory structure, which emphasized service classifications, and the creation of a new structure whose hallmark is flexibility, with regulation focused on protecting consumers by stimulating competitive forces."[10]

Flexibility for CMRS operators serves two essential Commission goals. First, it promotes the public interest by providing consumers with integrated and competitive service substitutes for wireline carrier offerings, and especially wireline incumbent local exchange carriers. Second, service flexibility tends to yield more efficient use of the public spectrum, by allowing users -- both licensees and consumers -- to respond to market demand quickly and without regulatory barriers. The seminal FCC Staff Paper "Using Market-Based Spectrum Policy to Promote the Public Interest"[11] has encapsulated the Commission's current spectrum policy: spectrum efficiency is best promoted by allowing the market to choose what consumers want and letting the users maximize "service flexibility, meaning the freedom to use spectrum for services of their choosing." Id. While some incumbent providers may try to stifle this flexibility, the FCC staff admonished that this "does not promote the public interest." Rather,

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10 *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, First Report, 10 FCC Rcd. 8844, 8872 (1995). With the 1993 Budget Act CMRS amendments to the Communications Act (Sections 332 and 2) and the Commission's implementing orders, federal CMRS law purposefully chose to break with the wireline paradigm of strict regulatory control of service offerings. As the Commission noted, "Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace." *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd. 1411, ¶ 14 (1994).

11 Written by Gregory Rosston and Jeffrey Steinberg (January, 1997), available at www.fcc.gov/bureaus/engineering_technology/informal/spectrum.

"[m]aximum service flexibility will enable spectrum users quickly and efficiently to modify their offerings to provide the services that consumers demand and that technology makes possible." Id. In implementing the broad language of Section 222 in the CMRS context, the Commission must harmonize its own progressive view of spectrum-based services.

Nothing in the 1996 Act suggests that the Commission should retreat from its progressive stance on regulation of competitive CMRS offerings. In fact, the 1996 Act and the Commission's post-1996 Act orders have affirmed that PCS services should be controlled by market demand, and not by regulatory edict. Significantly, the 1996 Act defines "local exchange carrier" in a manner that maintains a CMRS regulatory structure that is separate from traditional wireline telephone exchange regulation. See 47 U.S.C. § 153(26). The Commission also correctly concluded that CMRS operators should not be subject to LEC-type regulation.[12]

Moreover, five months after the passage of the 1996 Act, the Commission's CMRS Flexibility Order greatly broadened the level of permissible CMRS flexibility and service integration.[13] The CMRS Flexibility Order is premised on the facts that "we [the Commission] have consistently stated that we envisioned PCS providers offering a broad array of services . . . .,"[14] and that regulatory flexibility "encourage[s] innovation and experimentation in the development of wireless services, and lead[s] to a greater variety of service offerings to consumers."[15] Therefore, the public interest is best served "by giving licensees maximum

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12 *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Dkt. No. 96-98, 11 FCC Rcd. 15497, ¶¶ 1004-05 (1996) (subsequent history omitted).

13 *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd. 8965 (1996).

14 Id. at ¶ 6.

15 Id. at ¶ 3.

flexibility in the uses of CMRS spectrum."[16] Observing that most CMRS carriers intended "to offer integrated packages and combinations . . . ," the CMRS Flexibility Order fully embraces this market-based approach: "[a]llowing service providers to offer all types of fixed, mobile, and hybrid services in response to market demand will allow for more flexible responses to consumer demand, a greater diversity of services and combinations of services, and increased competition."[17]

For all these reasons, the Commission's prior orders with respect to CMRS clearly demonstrate that including integrated CMRS information service and handset service offerings within the consumer's total service package would strongly serve the public interest.

II. THE COMMISSION SHOULD SCALE BACK ONEROUS AND UNNECESSARY REGULATIONS EMBODIED IN THE ORDER.

The Commission's Notice of Public Information Collection(s) Submitted to OMB for Review and Approval[18] estimated that the aggregate cost of compliance with the Order's CPNI rules would be more than a quarter of a billion dollars, and that average compliance time per carrier would range from .5 to 77 hours. These heavy burdens are contrary to the 1996 Act's goal of "avoiding excessive regulation," see Order at ¶ 57, as well as Section 257's goal of reducing barriers to entry for small business. They also disregard Congress' clearly stated intention that Section 222 "balance both competitive and consumer privacy interests with respect to CPNI."[19]

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16 Id. at ¶ 1.

17 Id. at ¶¶ 21, 22.

18 63 Fed. Reg. 19725 (April 21, 1998).

19 Joint Explanatory Statement of the Committee of Conference, Rep. No. 104-458, at 205 [hereafter "Joint Explanatory Statement"].

Finally, such unnecessary regulatory burdens contradict the 1993 Budget Act's emphasis on avoiding unnecessary Title II regulatory burdens for CMRS. 47 U.S.C. § 332(c)(1).

These excessive regulations would also frustrate the 1996 Act's goal of encouraging competition and new entrants. The software and electronic audit system "safeguards" requirements, § 65.2009(a) and (d), and opt-in rules, § 65.2007, would have serious anti-competitive effects. Not only would they deprive consumers who decline to take the affirmative step of opting in of the benefits of competition, but they would also have a disparate impact on small businesses and newer entrants such as Omnipoint.

Incumbent providers, by contrast, have greater resources to absorb the costs of compliance, and are more likely to have separate billing systems and other procedures in place for keeping CPNI baskets separate because those carriers had to meet Computer II and Computer III safeguards. See Order at ¶ 194. Adding to the disparity against new entrants, larger and vertically integrated operators are authorized to share CPNI among their local, interexchange and CMRS affiliates pursuant to § 64.2005(a), putting them at a competitive advantage vis-à-vis new entrants who provide only a single type of service eligible for the total service exemption of § 64.2005(a). The Order's assertion that "the CPNI requirements are minimal" for carriers who offer only one service, id. at ¶ 194, is of no comfort to integrated CMRS carriers, who face burdensome obligations to segregate their marketing efforts.

Imposing these sorts of detailed and expansive regulatory requirements may well be warranted in non-competitive markets. However, in the CMRS market, where competition is thriving, as the Commission recently concluded in its Third Annual Report to Congress On the State of CMRS Competition,[20] there is substantially less justification for these restrictions on use of CPNI. In such an environment, the market itself imposes a significant check on carrier

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20 *FCC Adopts Third Annual Report to Congress On State of CMRS Competition*, Report No. WT 98-13, News Release (May 14, 1998).

privacy practices -- particularly in the area of use of CPNI to market additional services to customers. Customers dissatisfied with unwanted marketing pitches from their incumbent carrier not only may complain to the Commission, but may also switch with ease to a competing provider.

A. The Software and Electronic Audit Safeguards of § 64.2009(a) and (c) Should Not Apply to CMRS.

New Section 64.2009 prescribes software functionalities, training, electronic audit mechanisms, management assignments, record-keeping and reporting requirements. Omnipoint believes that all of these "Safeguards" will present significant burdens, but is most concerned about the software and electronic audit requirements set forth in subsections (a) and (c).

Section 222 does not require any of these costly compliance procedures. However, prescribing software and electronic audit functionalities is a particularly salient case of a top-down government requirement that will impose expensive procurement obligations on smaller carriers. Moreover, in providing for an eight-month grace period for these requirements, the Order acknowledges that conforming carriers' data systems and operations will take significant amounts of time. Id. at ¶ 202.[21]

These restrictions suffer from two additional defects. First, the rules would take effect in early 1999, when carriers' information systems departments will be under enormous pressure to complete Year 2000 updates. Rather than complicate and interfere with that vital computer programming burden, the Commission would do better to reconsider imposing further programming obligations with respect to CPNI. At the very least, the Commission should extend the deadline for compliance until after carriers' Year 2000 programming is complete.

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21 The fact that several large incumbents endorsed these requirements should give the Commission some pause as it considers whether to impose these requirements on all carriers. See AT&T, Bell Atlantic/NYNEX and Sprint Ex Partes.

Second, the rules fail to take account of carriers who have contracted out their marketing or billing functions for an extended period of time, and therefore have little leverage to ensure compliance by their subcontractors.

B. The Opt-in "Approval" Rule of § 64.2005 Should be Repealed for CMRS.

Another source of significant regulatory burden imposed by the Order is its adoption of an opt-in rule for use of CPNI outside of the carrier's total service offering. Id. at ¶¶ 91-107. As the US West study discussed in the Order at ¶¶ 99-100 indicates, the yield on opt-in requests will likely be very low, raising the costs of marketing efforts significantly. These costs would ultimately be passed along to consumers and would chill innovation by presenting barriers to carriers' ability to make informed decisions about whether and where to deploy new services outside the current total service offering.

Section 222's use of the term "approve" leaves the Commission ample discretion to adopt an opt-in rule. Indeed, the term does not require an affirmative expression of approbation.[22] Where Congress intended to establish an opt-in regime, it knew how to do so, and provided by statute for affirmative "consent" in specified formats.[23]

Omnipoint believes that at least in a competitive marketplace such as CMRS, the Order is mistaken that an opt-in rule will better serve the interests of competition than would an opt-out rule. See id. at ¶ 95. First, larger incumbent carriers will have a larger total service basket of services and will possess more "usable" CPNI than their smaller, new-entrant rivals. Furthermore, only carriers with significant resources to devote to compiling a substantial opt-in

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22 See, e.g., Websters New Int'l Dictionary of the English Language 106, 482 (3d ed. 1986) (definition of "approve" includes to "*have* or express a favorable opinion or judgment of") (emphasis supplied).

23 See, e.g., 47 U.S.C. § 551(b)(1) (Cable Act); 18 U.S.C. § 2710(b)(2)(B) (Video Privacy Protection Act).

list will be able to benefit from the efficiencies of tailored marketing efforts using CPNI to market outside of the total service basket.

In fact, an opt-in rule would very likely have the perverse effect of triggering increases in unwelcome marketing efforts. Under an opt-in regime, carriers have a strong incentive to seek customer approval through a major increase in intrusive telemarketing efforts, rather than unintrusive marketing through inserts in customer bills. As the US West study suggests, the rate of opt-in to telemarketing requests is likely to be several times higher than to direct mail, because of the better opportunity telemarketing offers to obtain immediate, oral approval. Id. at ¶ 99 nn.380-381. Furthermore, by depriving carriers of useful information with which to target marketing efforts, the rule will likely increase the number of broad, non-targeted marketing appeals by carriers directed at customers with little likely interest in the appeal.

Use of the term "approval" in Section 222 is at the very least sufficiently general to give the Commission discretion to adopt a notice and opt-out rule in competitive markets. Omnipoint believes that the Commission should reconsider its decision not to do so in the CMRS market.

III. THE COMMISSION SHOULD NARROW THE WIN-BACK RULE OF SECTION 64.2005(b)(3).

The Commission should clarify and reconsider the Order's conclusions with respect to carrier use of CPNI to retain existing customers who have expressed the intention to switch to another carrier and to "win back" customers who have recently switched. The Order adopted an overly narrow interpretation of Section 222 on this issue without the benefit of public notice and comment.[24] Its conclusions, presented with little explanation in a single paragraph of the Order, at ¶ 85, would deprive the customer of all benefits of improved service offers at precisely the period when customers receive the greatest competitive benefits of improved service offerings.

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24 See CTIA Request for Deferral and Clarification at 40-41.

With regard to "soon-to-be former" customers, the Order's conclusion does not accurately reflect the plain language of the statute, which authorizes use of CPNI without opt-in in "provision of" telecommunications service and related services. 47 U.S.C. § 222(c)(1). It is also incompatible with the total service rule interpreting this provision, which authorizes use of CPNI "for the purpose of providing or marketing service offerings among the categories of service . . . *already subscribed to* by the customer from the same carrier without customer approval." § 64.2005(a) (emphasis supplied).[25] Until a customer no longer subscribes to the carrier's service, customer retention efforts are clearly permitted under the total service rule.

With regard to customers who have recently switched to a different carrier, § 222(d)(1) provides an additional source of statutory authority for use of CPNI without opt-in. In framing improved offers for such customers, a carrier is using CPNI "to initiate" and to "render" telecommunications service within the meaning of that subsection.

These issues are of enormous importance in competitive markets in which carriers vie for business by providing better and better offers to retain or win back customers' business. Customer retention and win-back efforts provide enormous competitive benefits to consumers -- producing a bidding war for their business. Indeed, few activities at issue in this rulemaking are more closely linked to the "competitive . . . interests with respect to CPNI," Joint Explanatory Statement at 205, than this rule.

Furthermore, the Commission's rules would create economic inefficiencies. Customer "churn" -- which occurs in the CMRS market at a rate of approximately 30% per year -- raises carrier costs significantly through the inefficiencies of repeatedly establishing and closing accounts. Again, customers would be adversely affected as the costs of these inefficiencies were

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25 See also, e.g., Order at ¶ 54 ("Congress recognized through sections 222(c)(1)(A) and (B) that customers expect that carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service.")

passed along to them in the form of higher prices, and (in the context of CMRS) as customers increase expenditures on the rental/purchase of handsets for use with their new carriers.

IV. THE COMMISSION SHOULD CLARIFY TWO AMBIGUITIES IN THE ORDER THAT HAVE SIGNIFICANT IMPORT FOR COMPETITION.

A. The Commission Should Clarify that Carriers May Conduct Customer Reward Programs that Provide Telecommunications Customers With Free Items, Such as Free Equipment, Without Obtaining Customer Opt-in.

First, Omnipoint asks the Commission to clarify that Section 222 does not prevent carriers from providing telecommunications customers with free rewards, such as free equipment, for the purpose of retaining those customers' telecommunications accounts. For example, competitors in the CMRS industry may seek to reward certain customers by giving them accessories tied to their particular handset free of charge.

Such rewards fall within the scope of permissible activity under new Section 64.2005(a) because they are provided "for the purpose of providing or marketing service offerings . . . . already subscribed to by the customer," namely the customer's existing telecommunications service. Id. Furthermore, because the items are provided without charge, in such programs CPNI is not used "to market" a new service offering within the meaning of new Section 64.2005(b). Instead, its function is much the same as a cash rebate.

This clarification would benefit consumers by providing them with tangible benefits of competition. Carriers are far more likely to provide such rewards if they are able to target them to long-term or high volume customers, rather than to their entire customer base, and if they do not need to go through the expense of obtaining opt-ins before doing so.

B. The Commission Should Clarify that Information Relating to Customer Use of a Carrier's Non-Telecommunications Offerings Is Not CPNI Merely Because It Appears on a Telephone Bill

Omnipoint asks the Commission to clarify that Section 222 does not sweep within its reach bundled non-telecommunications services that also appear on a customer's telephone bill.

In the Clarifying Order (at ¶¶ 8-9), the Common Carrier Bureau explained that customer name, address and telephone number information is not CPNI merely because it appears on a telephone bill. Furthermore, in clarifying the range of permissible uses of CPNI in marketing bundled offerings, the Bureau reiterated that "customer information derived from the provision of any non-telecommunications service, such as CPE or information services . . . may be used to provide or market any telecommunications service regardless of telecommunications service categories or customer approval." Id. at ¶ 3 (quoting Order at 61, n.291). It follows from these propositions that customer information pertaining to usage of bundled information services or handset offerings is not CPNI merely because it appears on the same bill as the customer's telecommunications service.

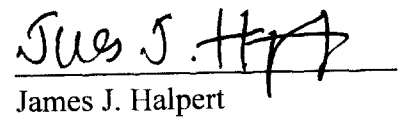
This conclusion is correct as a matter of statutory construction. Such customer usage information is not "receive[d] or obtain[ed] . . . by virtue of [a carrier's] provision of a telecommunications service" within the meaning of § 222(c)(1). Moreover, the phrase "pertaining to telephone exchange service or telephone toll service" in the definition of CPNI set forth in § 222(f)(1)(B) should be construed as modifying the entire preceding phrase "information contained in the bills," rather than simply the word "bills." A contrary result would result in bootstrapping the definition of CPNI in a way that would severely penalize carriers who provide customers with a single bill that includes bundled services that might be deemed to fall outside the total service approach. It would also contravene the Order's statement that "nothing in section 222(c)(1) prohibits CMRS providers from continuing to bundle various offerings consistent with other provisions of the 1996 Act." Id. at ¶ 47.

V. CONCLUSION

For the foregoing reasons, Omnipoint urges the Commission to reconsider and clarify portions of its Second Report and Order to better reflect Section 222's balance between the important purposes of promoting competition and consumer privacy.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS, INC.

By: 

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